No. 80-1040

In The

Supreme Court of the United States

October Term, 1980

I. MEYER PINCUS,

Appellant,

vs.

ESTATE OF LEO GREENBERG, HON. PAUL M. MARKO, III and HON. LEROY H. MOE,

Appellees.

On Appeal from the Supreme Court of Florida

REPLY BRIEF FOR APPELLANT

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Appellant submits this short reply to the brief of Amicus Curiae, the State of Florida ("Amicus").

1. The contention of Amicus that there is no "case or controversy" flies in the face of the undisputed facts below. Appellant applied for appointment as a co-personal representative of decedent's estate pursuant to decedent's wishes expressed in his Will. While the estate did not oppose the appointment, the courts below denied the application. Appellant

appealed the denial of his appointment, and the appeal was heard by the Supreme Court of Florida. While the estate did not oppose the appeal, Amicus appeared on the appeal in opposition to appellant. Although it claimed to be *amicus curiae* in that court, it took an adversarial position in arguing that the denial of the appointment should be affirmed. Amicus still takes an adversary position in this Court, although it disguises its position by claiming that it appears as *amicus curiae.*

Thus, there is truly a "case or controversy" in that appellant has standing by virtue of the denial of his rights, and his adversary is the State of Florida which persists in the denial of those rights. Furthermore, the estate is also a party in this proceeding. It was a party in the lower courts and in the Florida Supreme Court and is a party to this appeal. Surely appellant cannot lose his right to appeal from the direct injury to him simply because the estate does not oppose his appointment.

Finally, it should be noted that the Florida Supreme Court affirmed the denial of appellant's appointment solely on federal grounds. Thus, the case is properly before this Court. 28 U.S.C. §1257; *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938), *reh. denied,* 303 U.S. 667.

2. Amicus claims that there is no substantial federal question. Four judges have disagreed, *i.e.,* three dissenting judges of the Supreme Court of Florida and the judge of the federal district court who decided *Fain v. Hall,* 463 F. Supp. 661 (M.D. Fla. 1979). In this connection, the New York Surrogate's Court has also recently opined that these same Florida statutes are unconstitutional, *see In re Katherine Brown,* N.Y.L.J. 16 (Jan. 16, 1981), which demonstrates the spreading judicial interest in this important issue.

Contrary to the assertion of Amicus, this Court has never passed upon the question being presented on this appeal. To assert that the State has the right to prevent a decedent from determining how his estate is to be administered is a question which deserves this Court's attention, especially where the State makes distinctions based upon residency. We submit that the right to name an administrator of one's own choice is constitutionally protected for the reasons set forth in our main jurisdictional statement. It is not a question which involves determinations as to who can share in one's estate in the absence of a Will.

Moreover, the question at bar is not limited solely to lawyers or other professionals in whom a State would have some interest in regulating. The Florida prohibition applies to every non-resident, even if the non-resident is the decedent's close friend of 50 years standing. There can be no legitimate reason for excluding non-residents. The probate courts supervise the administration of estates, and nothing can happen to an estate without full accountability to the court.

Amicus suggests that Florida has greater interests in the estate administration than did the decedent. But Amicus distorts the facts herein to justify that interest. While decedent did die possessed of Florida real estate and a Florida bank account, the real estate was the apartment in which he resided and the bank account was a small one from which he paid his living expenses. The vast bulk of the estate — well over $1,000,000 — was and is situated outside of Florida. Amicus would nevertheless require Florida to assert jurisdiction over the non-Florida assets.

Finally, it is a mockery to believe that Florida would somehow achieve a better administration of the estate by appointing a total stranger than it would from appellant, who was decedent's close personal friend and advisor for many years.

3. Contrary to the assertion of Amicus, appellant raised every constitutional question below except the application of the Commerce Clause. He did not raise the Commerce Clause question until the appeal in this Court, and this was due to the fact that the decision by the Florida Supreme Court was decided before *Lewis v. B.T. Investment Manager, Inc.*, ____ U.S. ____, 100 Sup. Ct. 2009 (1980). With the decision in *Lewis,* the Commerce Clause issue became ripe for consideration in this case and we assert that question now. This Court can consider additional constitutional questions raised here though not raised below. *Banco National de Cuba v. Sabbaturo,* 376 U.S. 398 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967).

It is respectfully submitted that the appeal herein warrants plenary consideration.

Respectfully submitted,

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